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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 260.

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,

Debtor.

CITY BANK FARMERS TRUST COMPANY,
assignee of Florence H. Bugbee,

Petitioner,

—against—

IRVING TRUST COMPANY, as trustee of the estate of the above-named debtor, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI.

PETITIONER'S REPLY BRIEF.

ROLLIN BROWNE,
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Of Counsel.

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The numerous inaccuracies and fallacies in the trustee's brief might, in the absence of a reply, mislead the Court:

I.

(1) The trustee's statement (p. 5) that the questions set forth on page 7 of the petition are merely questions that "*might* arise in the construction of the provisions for landlords' claims in Section 77B" is totally unjustified. The questions there set forth have *actually* arisen in the case at bar and in the *Kuehner* case, and all nine of such questions have actually been

presented to this Court by the petition in the case at bar and the petition in the *Kuehner* case* (except question "(2)", which will be presented only if the cross-petitioners in the latter case file a petition).

(2) It is totally misleading for the trustee to state (p. 6) that only seven claims aggregating about $125,000 in amount "would be affected by the granting of a writ" in the case at bar. Perhaps the trustee means that those are the only claims which involve the precise situation presented by this case without any distinguishing features. For instance, the Voight claim alone, presented by the *amici curiae,* amounts to over $200,000, and there are numerous other claims, as mentioned in the petition, which involve, among other questions, the same fundamental question as that here presented.

(3) The fact that the English bankruptcy acts expressly provide that rejection shall terminate the liability of the bankrupt as well as the trustee does not distinguish those statutes from Section 77B. If a claim is provable under Section 77B, the liability of the tenant is automatically terminated upon the confirmation of a plan (see subdivision (h), Section 77B).

(4) The trustee's explanation of the reason for the elimination from the House bill of the provision conditioning provability of a landlord's claim upon the failure to terminate by reentry or otherwise, is entirely unconvincing. It was not necessary to eliminate this provision in order to make it clear that a claim based on a covenant for damages or indemnity should be allowable, for a covenant for damages or indemnity is clearly not terminated by reentry. Indeed, reentry is a condition precedent to the effective operation of a covenant of indemnity. (*Cf. Manhattan Properties,*

* The *Kuehner* petition (Docket No. 354) was filed on September 10, 1936.

Inc. v. *Irving Trust Co.*, 291 U. S. 320, 328-9; *Wm. Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 602.) Secondly, the elimination of the House provision conditioning allowability also clearly bore no relation to whether or not the provision for provability should be applicable to pending proceedings.

(5) In arguing that the construction contended for by it avoids grave question as to the constitutionality of the statute (p. 13), the trustee merely emphasizes the desirability of the issuance of a writ by this Court. Without arguing this question at the present time, it is sufficient to point out that *the trustee's position ignores that a valid lease was in existence at the time of the institution of the original bankruptcy proceeding in 1932,* and that the statute goes no further than to do away, for the purpose of the bankruptcy law, with the historical distinction between contracts relating to personalty and contracts relating to realty.*

II.

(6) The trustee states (p. 8) that the reentry, restoration, and reletting together terminated the lease "in accordance with its terms and under the applicable New Jersey law". It is significant that the trustee does not refer to any provision of the lease to that effect, or to any New Jersey decision.

(7) The trustee also states (p. 13) that the District Court held, following the Special Master, that the landlord's reentry "and her subsequent acts" terminated the debtor's liability under the lease, and that the "subsequent acts" were the "restoration of the

* Congress may in the exercise of its bankruptcy power, like its other plenary powers, impair or destroy contract rights or common law defenses, if the challenged provision bears a reasonable relation to the subject of bankruptcies. A provision conferring the character of provability on a claim clearly bears *such* a relation. *Cf. Norman* v. *B. & O. R. Co.*, 294 U. S. 240.

alterations" which the debtor had made and the reletting to other tenants. This is an incorrect statement of the District Court's holding. The District Court merely confirmed the Master's report and, as has been pointed out in the petition (p. 7) and our main brief (p. 22), the Special Master held that the action of the landlord in reentering and reletting without notice to the tenant terminated the lease, the Special Master adding that the fact that the landlord filed a claim for the cost of restoring the premises showed that "*by her reentry and reletting* of the premises as aforesaid, [she] considered that the lease terminated and expired" (R. 41).*

Since the Master, the referee in the prior bankruptcy proceedings, must be presumed to have known all the facts regarding the restoration, it is highly significant that the Master did *not* find that the repairs and restoration made by the landlord were of such nature as to change the character of the premises and thus effect a surrender by operation of law, irrespective of the intention of the landlord.** The duty of the Court of Appeals was, if not to reverse, to send the case back to the Master, not "in order for the Trustee to plead a fact as to which there was no dispute", but to enable the parties to introduce proof as to the exact nature of the repairs to be

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* The Master did not find that "the alterations made by the debtor had in fact been restored by the landlord", as the trustee asserts, nor "the facts with regard to the restoration" (pp. 16, 17). The petitioner's exception (R. 44, par. 5) was fully as broad as the "finding" of the Master.

** The filing of the claim for restoration did not evidence the landlord's understanding that the lease had been previously terminated, as the theory of the claim was that the bankruptcy had operated as an anticipatory breach of the covenant to restore (main br., p. 22n). That this was the theory of the claim is shown by the allegation in the proof of claim that "the lease has now expired *by reason of the bankruptcy*".

pleaded* and to enable the Master and the District Court to pass upon the legal question as to whether the making of such repairs effected a surrender by operation of law, a question which neither had passed upon.**

(8) The trustee also states (pp. 16, 18) that the landlord was "free" to restore the debtor's alterations only at the "expiration or other determination of the lease". The trustee refers to a covenant of the lease appearing on page 28 of the record in support of this assertion. The provision referred to merely provides that if the lessee should make any *improvements upon the premises*, "said improvements" should become the property of the landlord at the expiration or other determination of the lease. Obviously a *removed* party wall and a *hole in another wall* were not improvements which could become the property of the landlord at any time.***

Respectfully submitted,

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* *E. g.*, whether the repairs were required to preserve the building or to enable the landlord to relet it as an independent unit.

** General Order in Bankruptcy XLVII has no relevancy to a situation where the record is insufficient to enable the appellate court to determine whether the Master's conclusion was right, for a different reason than that relied on by the Master.

*** Even if they could be deemed improvements, the provision would clearly be inapplicable where the debtor *abandoned* the premises and the so-called improvements, as the debtor and the trustee did in the case at bar. In any event it would not follow that restoration of the *premises* (not of the alterations, as the trustee phrases it) would effect a termination of the lease under its terms. The only result would be the liability of the debtor for conversion of the improvements.